

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

No. 39272-1-II

DANIEL O. GLENN and CARLEEN L.
GLENN, husband and wife,

Appellants,

v.

THURSTON COUNTY BOARD OF
HEALTH,

Respondent,

and

DIANE OBERQUELL, KATHY WOLFE, and
ROBERT McCLOUD, in their representative
capacities as members of the BOARD OF
HEALTH,

Defendants.¹

UNPUBLISHED OPINION

J. Hunt — Daniel O. and Carleen L. Glenn appeal a superior court order dismissing their Land Use Petition Act² (LUPA) action challenging a notice of violation for a failing on-site

¹ We are leaving the spelling of defendant Cathy Wolfe's name as Kathy Wolfe as it has been spelled in the superior court. We mean no disrespect.

² RCW 36.70C.005.

sewage system. The Thurston County Superior Court dismissed the Glenns' LUPA action after finding that they had failed to name Thurston County as the respondent in their petition. Because the Glenns have repaired or replaced their sewage system since filing this appeal and there remains no violation to contest, we dismiss this appeal as moot.

FACTS

In the spring of 2007, the Thurston County Environmental Health Department evaluated the on-site sewage system serving the Glenns' home, located in the Henderson Watershed Protection Area in Olympia. Testing revealed contamination and suggested that the on-site sewage system was failing. Concluding that the system violated the Thurston County Sanitary Code, the Department issued a notice of violation, requiring the Glenns to repair their failing sewage system.

The Glenns appealed the notice of violation. A hearing officer and then the Thurston County Board of Health (BOH) denied the Glenns' appeal. The BOH again ordered the Glenns to diagnose and to repair the defective portions of their sewage system. After ordering additional testing,³ the BOH denied the Glenns' appeal.

The Glenns filed a LUPA petition in Thurston County Superior Court, naming as respondents the BOH and three BOH members in their individual capacities. Other than a reference to the BOH's being "an agency of the COUNTY OF THURSTON," the Glenns referred

³ This additional testing revealed that some of the contamination on the Glenns' property was from a pipe originating on the Glenns' property but that some was also coming from a neighbor's failing sewage system. Apparently, the Department also issued the Glenns' neighbors a citation. *See Clerk's Papers (CP)* at 22-23.

to the BOH, rather than Thurston County, throughout the petition. Clerk's Papers (CP) at 6. The Glenns asked the superior court to reverse the BOH decision and to award them "statutory attorneys' fees and costs." CP at 9.

Although not named as a party, Thurston County moved to dismiss the Glenns' LUPA petition, arguing that the BOH was "not a legal entity capable of being sued"⁴ and that the Glenns instead should have sued the County. CP at 19. Without moving to amend the petition to add Thurston County as a respondent, the Glenns asserted that the BOH was the proper respondent.⁵ The Glenns argued that the BOH was responsible for the action they were appealing and that boards of health had been the respondents in other LUPA actions.⁶ The superior court granted the County's motion to dismiss,⁷ concluding that the BOH was "not a legal entity capable of being sued" and that the Glenns had failed to serve the local jurisdiction timely as RCW 36.70C.040(2)(a)⁸ requires. CP at 63.

⁴ The County also argued that the Glenns had not served the individual BOH members. The superior court dismissed the individual BOH members; the Glenns do not challenge these dismissals.

⁵ The Glenns also moved to stay enforcement of the Department's order to repair their sewage system. They argued that a stay was necessary to avoid "irreparable harm in requiring the expenditure of time effort, and monies which would not be necessary if it is determined that the correction of [the neighbor's system] eliminates the violation of the Code." CP at 24.

⁶ Noting that the cases the Glenns cited did not address the issue involved here, the superior court distinguished the cases: *Parkland Light & Water Co. v. Tacoma-Pierce County Bd. of Health*, 151 Wn.2d 428, 90 P.3d 37 (2004), and *Griffin v. Thurston County Bd. of Health*, 137 Wn. App. 609, 154 P.3d 296 (2007). The court further noted that the mere naming of boards of health in these cases was not determinative of the issues involved here.

⁷ The superior court also stated that it would have denied the Glenns' motion to stay if it had considered it.

⁸ RCW 36.70C.040(2)(a) provides:

The Glenns appealed to our court. Thurston County moved to dismiss the appeal as moot when it learned that the Glenns had complied with the violation order they sought to challenge. The County advised us that (1) the Glenns had accepted a \$5,000 grant from a county financial assistance program to help replace their “failed on-site sewage system”; (2) the Glenns had replaced their sewage system; and (3) on November 2, 2009, the County had approved the Glenns’ new sewage system installation. *See Spindle*: Respondent’s Motion to Dismiss (filed 11/18/2009).

The Glenns responded that we should deny the County’s motion to dismiss because (1) they had repaired the system, at a cost of more than \$18,000, under threat of sanctions even though there was evidence that the apparent system failure was caused by their neighbor’s failing sewage system; (2) they were not required to stay the enforcement action to preserve their right to appeal; (3) their acceptance of county assistance did not preclude the appeal; and (4) a favorable decision on the appeal could impact their ability to seek “further relief.” Appellant’s Resp. Br. (filed 12/1/2009) with attached Glenn Decl. at 3-4. In a supporting declaration, Daniel Glenn stated that the Glenns intended to try to “recoup from the County through the legal process, the first stage of which is this LUPA matter.” Glenn Decl. at 5.

Our court commissioner denied Thurston County’s motion to dismiss the Glenns’ appeal, which this panel of judges now considers.

(2) A land use petition is barred, and the court may not grant review, unless the petition is timely filed with the court and timely served on the following persons who shall be parties to the review of the land use petition:

(a) The local jurisdiction, which for purposes of the petition shall be the jurisdiction’s corporate entity and not an individual decision maker or department[.]

ANALYSIS

The threshold issue is whether we should dismiss this appeal as moot. We conclude that we should.

“A case is moot if a court can no longer provide effective relief.” *Orwick v. City of Seattle*, 103 Wn.2d 249, 253, 692 P.2d 793 (1984) (citing *In re Det. of Cross*, 99 Wn.2d 373, 377, 662 P.2d 828 (1983), *State v. Turner*, 98 Wn.2d 731, 733, 658 P.2d 658 (1983)). In general, we will not address a moot issue unless the issue involves matters of continuing and substantial public interest. *State v. Ross*, 152 Wn.2d 220, 228, 95 P.3d 1225 (2004) (citing *State v. Blilie*, 132 Wn.2d 484, 488 n.1, 939 P.2d 691 (1997); *Grays Harbor Paper Co. v. Grays Harbor County*, 74 Wn.2d 70, 73, 442 P.2d 967 (1968)). If the public interest exception is satisfied,⁹ we may address an otherwise moot issue. *Ross*, 152 Wn.2d at 228. Such is not the case here.

The Glenns have repaired or replaced their sewage system such that it is no longer in violation of the County health code. Thus, we can no longer provide the relief they requested in their LUPA petition, namely reversal of the County’s order to repair the defective portions of their sewage system.

Furthermore, although the Glenns suggest that resolution of their LUPA petition may allow them to pursue additional relief, such as damages, they do not specify what additional relief

⁹ When evaluating whether the public interest exception applies, we consider: “(1) whether the issue is of a public or private nature; (2) whether an authoritative determination is desirable to provide future guidance to public officers; and (3) whether the issue is likely to recur.” *Hart v. Dep’t of Soc. & Health Servs.*, 111 Wn.2d 445, 448, 759 P.2d 1206 (1988) (citing *Cross*, 99 Wn.2d at 377).

they intend to pursue. But LUPA neither provides for nor allows damages claims. RCW 36.70C.030(1)(c) (LUPA does not apply to “[c]laims provided by any law for monetary damages or compensation.”). Nor would any LUPA-based relief be dispositive in an action for monetary damages or other compensation. RCW 36.70C.130(2) (“A grant of relief [under LUPA] by itself may not be deemed to establish liability for monetary damages or compensation.”). Even if we were to address the moot issue, it does not appear that the Glenns are entitled to other relief such as damages.

The issue involved here—whether the Glenns should have sued the County instead of the BOH—may reoccur and, in theory, may be an issue of public interest for which we could provide future guidance. Nevertheless, this issue will likely reoccur in a future active controversy in which we may more properly address it. Thus, we decline to exercise our discretion to consider this moot issue here.

Accordingly, we dismiss this appeal as moot. Because the Glenns’ arguments had some debatable merit, however, we decline Thurston County’s request for attorney fees under RAP 18.9(a).

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports but will be filed for public record pursuant to RCW 2.06.040, it is so ordered.

Hunt, J.

We concur:

No. 39272-1-II

Van Deren, CJ.

Penoyar, J.